90-1217

FILED
JAN 28 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

Shirley M. Kearing,
Petitioner,

v.

The Honorable S. Martin Teel, Jr., et al,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia

APPENDIX A
COURT ORDERS & OPINIONS

Shirley M. Kearing, Pro Se
For the Petitioner
4200 Cathedral Avenue, N.W.
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FILED OCTOBER 29, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5062 SEPTEMBER TERM, 1990
USDC Civ. No: 89-2837

Shirley M. Kearing,
Appellant,

v.

S. Martin Teel, Jr., U.S. Bankruptcy Court, et al,

BEFORE: Wald, Chief Judge;
Ruth B. Ginsburg and Williams,
Circuit Judges

O R D E R

Upon consideration of Appellant's Petition for Rehearing, filed September 17, 1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

FILED OCTOBER 29, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5062 SEPTEMBER TERM, 1990
USDC Civ. No: 89-2837

Shirley M. Kearing,
Appellant,

v.

S. Martin Teel, Jr., U.S. Bankruptcy Court, et al,

BEFORE: Wald, Chief Judge;
Mikva, Edwards,
Ruth B. Ginsburg, Silberman,
Buckley, Williams,
D. H. Ginsburg, Sentelle,
Thomas, Henderscn and
Randolph,
Circuit Judges

O R D E R

Appellant's Suggestion for Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

FILED OCTOBER 10, 1990

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 90-5062 SEPTEMBER TERM, 1989
C. A. No. 89-02837

Shirley M. Kearing,
Appellant,

v.

S. Martin Teel, Jr., U.S. Bankruptcy Court, et al,

BEFORE: Wald, Chief Judge;
Ruth B. Ginsburg, Williams,
Circuit Judges

O R D E R

Upon consideration of the motions for summary affirmance and appellant's response to this court's order to show cause filed May 11, 1990, it is

ORDERED that the order to show cause order be discharged. It is

FURTHER ORDERED that the motions for summary affirmance be granted for reasons stated by the district court in its memorandum and order filed February 13,

1990. The issue of whether the bankruptcy court has civil contempt powers has not been decided by this circuit. It is not necessary to resolve that issue here for appellant otherwise failed to state a claim against the appellees. The merits of the parties' positions are so clear as to justify summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 15.

Per Curiam

FILED FEBRUARY 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY M. KEARING, Plaintiff,	)	
v.	)	Civil Action No. 89-2837
THE HONORABLE S. MARTIN TEEL, JR., ET AL., Defendants.	)	

MEMORANDUM

On October 16, 1989, plaintiff Shirley Kearing filed this action against the Honorable S. Martin Teel, U.S. Bankruptcy Judge for the District of Columbia, Martin L. Bloom, clerk of the U.S. Bankruptcy Court for the District of Columbia, attorneys John Guinee, Peter Kolker, and Renee Franklin Hill, the law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker, John Waites, United States Trustee, and Dennis Early of the Office of the United States Trustee. On January 22, 1990, Kearing submitted to the clerk's

office an "Amendment to Original Complaint for Damages (Illegal Arrest)," which the Court accepts for filing as an amended complaint. The amended complaint adds as defendants the United States Marshal for the District of Columbia, Herbert Rutherford, and his deputies, J. Neely, V. Kerr, and P. Link, and increases the relief sought from $29 million to $34 million.

All of the original defendants moved to dismiss the original complaint, and Kearing opposed. The original defendants plus the four added defendants have now moved to dismiss the amended complaint.

The amended complaint states that on October 14, 1988, defendants "through malfeasance, misfeasance, and nonfeasance of duty" caused "a tortious act" and violated plaintiff's due process rights by "consummating an illegal arrest and incarceration."

Apparently, on October 14, 1988, U.S. Marshals arrested Kearing in the mistaken belief that they were carrying out a contempt order issued by Judge Teel in connection with a bankruptcy proceeding. Judge Teel had indeed issued a contempt order on September 30, 1988, authorizing the Marshal to seize Kearing ten days after service of the order. However, Judge Teel, by order of October 14, 1988, the same day as Kearing's arrest, had extended Kearing's time to file objections to the contempt order to October 24, 1988. Kearing was arrested at 3:15 p.m. Upon learning of her detention, at 4:02 p.m. Judge Teel issued an order for her release.

The complaint does not explain how the various defendants were involved in the due process violation. Rutherford is presumably a defendant because he is the supervisor of Neely, Kerr and Link, who

allegedly executed the arrest. Judge Teel presumably a defendant because he issued the contempt order, and Bloom is presumably in the case as Judge Teel's subordinate. Guinee, the trustee in the Kearing bankruptcy, is presumably a defendant by virtue of the fact that he sought and obtained from Judge Teel an order compelling the Kearings to provide him information, and Mrs. Kearing's refusal to comply led to Judge Teel's contempt order. Early of the U.S. Trustees Office is presumably a defendant on account of his appointment of Guinee as trustee, and Waites is presumably a defendant because he is Early's superior. Kolker, Hill and the Zuckerman, Spaeder firm are apparently in the case because they represented Guinee in the bankruptcy litigation.

The amended complaint must be dismissed, pursuant to Rule 12(b)(6) of the Federal

Rules of Civil Procedure, for failure to state a claim upon which relief may be granted.

Arrest or imprisonment resulting from negligence does not amount to a constitutional tort. Baker v. McColan, 443 U.S. 137 (1979) (no § 1983 liability where defendant was arrested on valid warrant because of mistaken identity). However, the Court must not dismiss the complaint unless the plaintiff can prove no set of facts which would entitle her to relief, Conley v. Gibson, 355 U.S. 41 (1957), and Kearing could conceivably be claiming, although the available evidence suggests otherwise, that her arrest was not the result of mixed signals but rather a deliberate effort by some or all defendants to violate her rights. Nevertheless, Kearing has failed to state a constitutional tort claim.

Kearing relies on 42 U.S.C. § 1983 as the basis for jurisdiction of this action, but the amended complaint fails to state a claim under § 1983 because it alleges no action by any person under color of state law, only an arrest by federal marshals, perhaps with the complicity of other federal officials and others acting under the color of federal authority. See, e.g., Daly-Murphy v. Winston, 837 F.2d 348, 355 (9th Cir. 1987).

The amended complaint also fails to state a claim under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

The claims against the non-federal defendants do not state a Bivens claim. Guinee took actions as trustee, a party to litigation, that led to the contempt order against Kearing. This was not conduct under color of law and thus was not a due

process violation. See Dennis v. Sparks, 449 U.S. 24, 28 (1980). Accordingly, Guinee cannot be held liable under Bivens, and Kolker, Hill and Zuckerman, Spaeder cannot be held vicariously liable by virtue of their representation of him in carrying out his trustee function.[1]

The claims against Early and Waites must be dismissed for failure to meet the heightened pleading standard for Bivens actions, which requires specific allegations of constitutional violations by each defendant, see e.g., Martin v. Malhoyt, 830 F.2d 237, 254 (D.C. Cir.

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[1] A suit against a bankruptcy trustee for quasi-judicial actions, as opposed to actions undertaken as a party to litigation, would be subject to dismissal on immunity grounds. See Mullis v. U.S. Bankruptcy Court for the District of Nevada, 828 F.2d 1385 (9th Cir. 1987) (federal bankruptcy trustee absolutely immune for quasi-judicial actions); Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) (members of D.C. Court of Appeals committee on unauthorized practice of law absolutely immune for quasi-judicial actions).

1987), with special pleading requirements for liability based on supervisor status. See Haynesworth v. Miller, 820 F.2d 1245, 1262-63 (D.C. Cir. 1987). The bare facts that Early was involved in the appointment of Guinee and that Waites is Early's superior do not amount to a specific allegation of constitutional violation.

To the extent that Judge Teel can be held responsible for the arrest, he is entitled to absolute immunity under Bradley v. Fisher, 80 U.S. 335 (1871) and Stump v. Sparkman, 435 U.S. 349 (1978). Contrary to Kearing's assertion, bankruptcy judges clearly have contempt power, Bankruptcy Rule 9020. Therefore, Judge Teel did not act in "the clear absence of all jurisdiction." Stump, 435 U.S. at 356-57.

Judicial immunity extends to other government officials for action closely associated with the judicial process. See

Cleavinger v. Saxner, 474 U.S. 193, 200 (1985). This doctrine clearly covers clerk Bloom, see Panko v. Rodak, 606 F.2d 168 (7th Cir. 1979), cert. denied, 444 U.S. 1081 (1980), as well as the four marshals, who, pursuant to statutory duty, see 28 U.S.C. § 566(a), were executing the order issued by Judge Teel. See U.S. Steelworkers of America, AFL-CIO v. Bishop, 598 F.2d 408, 414 (5th Cir. 1979) (marshals executing magistrate's order absolutely immune from suit).

For purposes of the motion to dismiss the Court must consider an alternative theory, namely that the marshals exercised independent discretion in carrying out the arrest. The Court concludes that, even if the marshals were not entitled to absolute immunity, they would be entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982), because a

reasonable person in their situation would not have known that their conduct violated clearly established law. See also Anderson v. Creighton, 483 U.S. 635 (1987). Even if it could be gleaned from Kearing's complaint that she was alleging that the marshals' conduct was undertaken pursuant to an unconstitutional motive, the case law makes clear that the action must be dismissed. "If a plaintiff fails to allege direct evidence of unconstitutional intent, his claim must be dismissed immediately." Whiteacre v. Davey, 890 F.2d 1168, 1171 n.4 (D.C. Cir. 1989). "[I]n order to obtain even limited discovery, such intent must be pleaded with specific, discernible facts or offers of proof that constitute direct as opposed to merely circumstantial evidence of intent." Siegert v. Gilley, slip. op. at 9 (D.C. Cir. February 9, 1990). See also Martin v. D.C. Metro. Police Dep't.,

812 F.2d 1425, 1435 (D.C. Cir. 1987). There is no evidence whatsoever that the marshals actually knew their conduct was unlawful or acted for any other reason other than because they did not know that Judge Teel had stayed his contempt order.

For the foregoing reasons the motions to dismiss must be granted and the complaint dismissed.

A separate Order accompanies this Memorandum.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

February 13, 1990.

FILED FEBRUARY 13, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHIRLEY M. KEARING, Plaintiff,	)	
v.	)	Civil Action No. 89-2837
THE HONORABLE S. MARTIN TEEL, JR., ET AL., Defendants.	)	

ORDER

Upon consideration of the motions of the defendants dismiss the complaint and the first amended complaint and the oppositions thereto, and for the reasons stated in the accompanying Memorandum, it is hereby

ORDERED that plaintiff's "Amendment to Original Complaint" is accepted for filing as an amended complaint; and it is further

ORDERED that the unopposed motion of defendants Teel, Bloom, Early, Waites, Rutherford, Neely, Kerr and Link for enlargement of time to file an answer or response to plaintiff's amended complaint

is granted nunc pro tunc; and it is further

ORDERED that the motion of defendants Teel, Bloom, Early, Waites, Rutherford, Neely, Kerr and Link to dismiss plaintiff's first amended complaint is granted; and it is further

ORDERED that the motion of defendants Guinee, Kolker, Hill, and Zuckerman, Spaeder, Goldstein, Taylor & Kolker to dismiss plaintiff's first amended complaint is granted; and it is further

ORDERED that the complaint is dismissed with prejudice.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

February 13, 1990.

FILED OCTOBER 14, 1988
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

The United States Marshal for the District of Columbia is hereby directed to release Shirley M. Kearing from custody. The Court's order of contempt is not yet effective because the Court has granted Shirley M. Kearing an additional period of time, until October 17, 1988, to file objections to the order of contempt.

Dated: October 14, 1988, 4:02 p.m.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED OCTOBER 14, 1988
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

O R D E R

Upon consideration of the motion of Shirley M. Kearing for an extension of time to October 24, 1988, in which to file objections to Findings of Fact, Conclusions of Law, and Contempt Order, and the matters of record herein, it is by the Court this 13th day of October, 1988,

ORDERED, that the said motion be and the same hereby is, granted, and the time for filing Objections pursuant to Bankruptcy Rule 9033 is extended to and including Monday, October 24, 1988.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED SEPTEMBER 30, 1988
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER DENYING CONTEMPT MOTION
WITH RESPECT TO LEON R. KEARING

The Court's Order of August 16, 1986 [sic] vacated the Court's Order entered August 8, 1988 as moot. The Order of August 8, 1988 ought not have been vacated with respect to that part adjudging that Leon R. Kearing was not in contempt. Accordingly it is

ORDERED that Leon R. Kearing not be held in contempt pursuant to the Trustee's motion and Leon R. Kearing is hereby discharged from this Court's Order to Show Cause entered June 30, 1988.

Dated this 29th day of September 1988.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED SEPTEMBER 30, 1988
UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER OF CONTEMPT

The Court having rendered Findings of Fact and Conclusions of Law Re Contempt determining that Shirley M. Kearing is in contempt of the Court's Order of April 25, 1988, it is hereby ORDERED, ADJUDGED AND DECREED

1. That 10 days after service of this Order, Shirley M. Kearing shall surrender herself to the United States Marshal and, if she fails to do so, the United States Marshal or his Deputy shall, subject to paragraph 4 of this Order, seize Shirley M. Kearing.

2. That, upon the surrender to (or seizure by) the United States Marshal of

Shirley M. Kearing, the United States Marshal shall incarcerate Shirley M. Kearing.

3. Shirley M. Kearing shall remain incarcerated until she complies with this Court's Order of April 25, 1988, (1) by turning over to the Trustee all cancelled checks, deposit slips and withdrawal slips for the Debtor's account at American Security Bank, N.A. (Account No. 11-114-49-189) and (2) by cooperating with the Trustee in obtaining offers for the purchase of her house at 4801 Van Ness Street, N. W. and, in particular, by permitting access to the premises to allow the Trustee or his agent to show the house to prospective purchasers.

4. That the Trustee recover of Shirley M. Kearing, to replace the rental proceeds in that amount that she failed to turn over to the Trustee from units at 4444

Connecticut Avenue, N.W., the sum of $7,800 together with interest thereon after the date of entry of this order as provided by law.

5. That, pursuant to Bankruptcy Rule 9020, this Order shall be effective 10 days after a copy of it is served and shall have the same force and effect as an order of contempt entered by the District Court unless, within the 10 day period, Shirley M. Kearing serves and files with the Clerk of the Bankruptcy Court, objections to this Court's finding of fact and conclusions of law, said objections to be prepared in the manner provided in Bankruptcy Rule 9033(b) and District Court Local Rule 603.

Dated: September 29, 1988.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

NOTE: THE PRECEDING DOCUMENT HAD THE FOLLOWING MARSHALS' HANDWRITTEN ARREST STATEMENT APPENDED UNDERNEATH THE BANKRUPTCY JUDGE'S SIGNATURE:

10-14-88 - Fully executed the above order taking the above person in custody 3:15p.m.

signatures of

J. Neely DUSM
V. Kerr D.U.S.M.
Paul C(?) Link D.U.S.M.

FILED SEPTEMBER 30, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW
RE CONTEMPT

The Trustee has brought a civil contempt proceeding concerning the alleged failure of Shirley M. Kearing to comply with an order of this Court entered April 25, 1988. Evidence was presented at a hearing of September 20, 1988, and counsel made arguments. The Court makes the following findings of fact and conclusions of law pursuant to Bankruptcy Rule 9020.

FINDINGS OF FACT

1. On April 25, 1988, this Court entered an order granting the Motion to Compel Cooperation by Debtors filed by the Trustee, John W. Guinee, Jr. There the

Court, in pertinent part,

> ORDERED, that the Debtors cooperate with the Trustee and his agent(s) in an effort to obtain offers to purchase the real property [known as 4801 Van Ness Street, N.W., Washington, D. C.] by maintenance of the premises in a clean and orderly condition * * * and to otherwise reasonably assist in obtaining high prices for any offers to purchase; and to allow prospective purchasers to examine the premises, upon 2-1/2 hours advance notice from a real estate agent, during the hours of 12 noon to 5:00 p.m. Monday through Friday and from 1:00 p.m. to 5:00 p.m. on Sunday;
>
> * * * * *
>
> ORDERED that the Debtor Shirley Kearing immediately turn over to the Trustee, the funds of Debtors at the American Security Bank, N.A. (the Court finding that these funds represent rents received after the trustee was appointed) and that the Debtor, Shirley Kearing, immediately turn over to the Trustee, any and all rents that she may in the future collect from the tenants of units 201,

> 502 and 504, 4444 Connecticut Ave., N.W., Washington, D. C. and that the Debtor, Shirley Kearing, direct said tenants to make all future rent payments directly to the Trustee; * * *
>
> ORDERED that the Debtor, Shirley Kearing, mail to the Trustee by April 17, 1988, copies of all bank statements, cancelled checks, deposit slips and withdrawal slips for the Debtors' account at American Security Bank, N.A.; * * *
>
> ORDERED that the Debtors cooperate with the Trustee in every other effort which he undertakes in the fulfillment of his statutory duties.

That Order is subject of a motion for leave to appeal but it has not been stayed pending appeal.

2. Debtor Shirley M. Kearing failed to turn over $7,800 in rents collected from the tenants of units 201, 502 and 504, 4444 Connecticut Ave., N.W., Washington, D. C. after entry of the April 28 order directing

her to turn over all rents to the Trustee. According to Mrs. Kearing, the funds have been dissipated in litigating various aspects of her bankruptcy case.

3. The Debtor, Shirley M. Kearing, has also failed to turn over the funds of the Debtors at American Security Bank, N.A. The Trustee, however, has not shown clear and convincing evidence that the account contained any funds when the April 25, 1988 Order entered.

4. Debtor Shirley M. Kearing failed to mail the Trustee copies of all bank statements, cancelled checks, deposit slips and withdrawal slips for the Debtors' account no. 11-114-49-188 at American Security Bank, N.A. The Trustee has obtained copies of the account statements from the bank for January 20, 1988, through July 18, 1988, attached, but does not have copies of the other items. (Copies of the

account statements for January 20 through July 18, 1988, are attached to Movant's Exhibit 2 for the September 20, 1988 hearing.)

5. Debtor Shirley M. Kearing refuses to cooperate in any way with the Trustee's efforts to obtain an offer for the purchase of the house at 4801 Van Ness Street, N.W. and, in particular, has refused to allow the Trustee access to the premises to show it to prospective purchasers.

6. Shirley M. Kearing has four tenants at 4801 Van Ness Street, N.W., and has entered into a written lease with each. She refused to permit the Trustee to examine and copy the written leases and has refused to divulge the names of the tenants (other than that of her son who is one of the tenants). Her refusal to provide this information was not raised in the Trustee's motion requesting the Court to order Mrs.

Kearing to appear and show cause why she should not be held in contempt.

7. Shirley M. Kearing has refused to permit the Trustee to examine and copy her Federal income tax returns for the years 1981 and 1984 through 1987, copies of which she has in her possession. The 1981 return contains information essential for the Trustee to be able to complete reports and take action required by his statutory duties because the last residence of Debtor Shirley M. Kearing before 4801 Van Ness Street, N.W. was sold in 1981. See Movant's Exhibit 2 at pa. 37. The 1981 return will help the Trustee ascertain the Debtors' basis in the 4801 Van Ness Street property, since the return will likely reflect an election to defer recognition of any gain on the sale of the former residence with a resultant reduction of the basis in their new residence at 4801 Van

Ness Street. Shirley M. Kearing similarly refused to turn over to the Trustee her income tax returns for the years 1984, 1985, 1986 and 1987, tax years of obvious relevance to the Trustee in the administration of this case.[2]

8. On June 30, 1988, this court entered an Order to Show Cause, directing the Debtors to show cause on July 13, 1988, why they should not be held in contempt for failure to comply with the Order of this Court entered April 25, 1988, as alleged in a motion filed by the Trustee. After hearing evidence and for the reasons stated on the record at the hearing of July 13, 1988, the Court found Leon R. Kearing to

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[2] Although the Trustee could request that copies of the returns at issue be provided by the Internal Revenue Service (see 28 U.S.C. Section 6103(e)(5)(A), he presumably desires to avoid the expense, delay and uncertainty that would entail where the information can be quickly obtained from the debtors.

not be in contempt. Shirley M. Kearing requested appointed counsel. Eventually, counsel was appointed and a completely new hearing was held as to Mrs. Kearing pursuant to the show cause order on September 20, 1988.[3]

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[3] The procedural background leading to that hearing was as follows. At the hearing of July 13, 1988, Mrs. Kearing indicated that she had attempted to obtain the services of an attorney and no one had agreed to represent her. The Court understood her to be referring to attempts to obtain representation for the entire case, not representation specifically for the contempt proceeding. Mrs. Kearing queried concerning her entitlement to appointed counsel. Although Mrs. Kearing is clearly not entitled to appointed counsel in the entire case, the Court later determined as a matter of law that, if indigent, Mrs. Kearing could not be held in contempt and incarcerated without first being afforded appointed counsel for the contempt proceeding. Accordingly, the Court entered an order on August 8, 1988, directing Mrs. Kearing to appear on September 14, 1988, to address the questions of why she had been unable to obtain counsel and the extent of any exempt assets or post-petition assets held by her that might be available for payment of coercive contempt sanction if she were held in contempt and monetary sanctions were deemed an appropriate remedy.

9. Shirley M. Kearing has no income of her own and has insufficient assets from

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On August 15, 1988, Mrs. Kearing and the Trustee's attorney were present for a hearing on another matter before the Court. Both agreed to address the aforementioned questions at that hearing. After hearing arguments, the Court concluded that incarceration would likely be the only effective coercive contempt sanction. Accordingly, the Court entered an order on August 16, 1988, directing Mrs. Kearing to submit an affidavit establishing her entitlement to appointment of counsel under the Criminal Justice Act by August 19, 1988, and, in the event of appointment of counsel, to appear on September 14, 1988, for a new hearing to show cause why she should not be punished for civil contempt of court for failing to comply with the order entered on April 25, 1988.

On August 31, 1988, Mrs. Kearing belatedly filed the required affidavit under the Criminal Justice Act. On September 14, 1988, the Court entered an order concluding that Mrs. Kearing was entitled to appointed counsel and appointed Joseph Zitomer to appear and defend on her behalf with respect to the motion by the Trustee to hold her in contempt for failure to comply with the order of April 25, 1988. Upon Mr. Zitomer's request, the September 14, 1988 hearing was continued to September 20, 1988, in order to give Mr. Zitomer an opportunity to familiarize himself with the matter.

which to pay a coercive contempt fine.

CONCLUSIONS OF LAW

A. Applicable Standards

1. In civil contempt proceedings the movant carries the burden of showing contempt by clear and convincing evidence. NLRB V. Blevins Popcorn Co., 659 F.2d 1173, 1183 (D.C. Cir. 1981). In addition, an injunction must have given specific notice of the conduct required in order for contempt to be present. Terminal R.R. Assn. v. United States, 266 U.S. 17, 29 (1924); In re Rubin, 378 F.2d 104, 198 (3rd Cir. 1967); Fidelity Mortg. Investors v. Camelia Builders, Inc., 550 F.2d 47 (2nd Cir. 1976).

B. Conduct As to Which Contempt Exists

2. Applying those standards, it is plain that Shirley M. Kearing is in contempt of this Court's Order of April 25, 1988, in the following regards:

A. She failed to pay over $7,800 in rentals from units at 4444 Connecticut Ave., N.W.

B She has failed to furnish to the Trustee copies of all bank statements, cancelled checks, deposit slips and withdrawal slips for Debtors' Account No. 11-114-49-188 at American Security Bank, N.A.

C. She refuses to cooperate with the Trustee in any way to obtain offers to purchase the house at 4801 Van Ness Street, N.W., and has failed to permit access to the property for purposes of showing it to prospective purchasers.

3. Shirley M. Kearing argues that she is not required to comply with this Court's order of April 25, 1988, because she is appealing the previous order that appointed a Trustee and the order of April 25, 1988.

Those prior orders have not been stayed.[4] Hence, they are enforceable orders until overturned.

4. Nor is it a defense that Mrs. Kearing may believe in good faith that her appeals of the prior orders excuse her compliance with the order of April 25, 1988. Willfulness is not a valid defense in a civil contempt proceeding, unlike in a criminal contempt proceeding. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191

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[4] Mrs. Kearing argues that the proceeding to hold her in contempt was stayed by the District Court's Order filed August 12, 1988 in Civil Action No. 88-1232, the appeal from, inter alia, the Bankruptcy Court's order of April 25, 1988. That order of August 12, 1988 merely requested the Bankruptcy Judge to make a certification under District Court Local Rule 604(c) to assist the District Court in making a determination whether to allow an appeal and directed "that all further proceedings with respect to this appeal are stayed pending submission of the Bankruptcy Judge's written certification ...." It stayed only proceedings in the District Court on the appeal, not any contempt proceeding in the Bankruptcy Court.

(1949).

5. The Trustee is entitled to a compensatory contempt award of $7,800 with respect to Mrs. Kearing's failure to pay over rents from tenants at the Connecticut Avenue units.

6. The Trustee is entitled to a coercive contempt sanction with respect to the remaining items of contempt.

7. Mrs. Kearing does not have any source of income or significant assets of her own. Accordingly, the only appropriate coercive sanction is to incarcerate her as long as she fails to comply with this Court's order.

B. Conduct As To Which Contempt Does Not Exist

8. With respect to the Trustee's remaining allegations of misconduct by Mrs. Kearing (namely, the failure to turn over income tax returns and the identities and

leases of tenants at 4801 Van Ness Street), none of these allegations was presented by the Trustee's original motion. However, the attorneys for the Debtor and the Trustee agreed to discuss the status of the case after the hearing of September 14, 1988 (see note 2 at page 5, supra) and at the September 20, 1988 hearing the Debtor raised no objection that she had not had full notice that these allegations would be heard. Thus, the Debtor waived any objection that she was deprived of the protections of the requirement in Bankruptcy Rule 9020 that the written notice of contempt hearing "state the essential facts constituting the contempt charged."

9. In alleging that the Debtor should be held in contempt for her failure to turn over the tax returns and the identities of the tenants of 4801 Van Ness and copies of

their leases for that property, the Trustee relies on the provisions of this Court's Order of April 25, 1988, requiring the Debtors to cooperate with the Trustee in carrying out his statutory duties.

However, an order compelling compliance will not form the basis for holding the Debtor in contempt for failing to undertake certain acts if the acts were not specifically required by the order. See cases cited in paragraph 1, supra. As the Supreme Court has stated:

> In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meanings of its terms when read in light of the issues and the purpose for which the suit was brought; and the facts found must constitute a plain violation of the decree so read. [Citations omitted.]

Terminal R.R. Assn., 266 U.S. at 29.

10. The order for cooperation was entered in accordance with 11 U.S.C. Section 521(3) which requires the Debtor to "cooperate with the Trustee as is necessary

to enable the Trustee to perform the Trustee's duties under this title." The Court is with undoubted power to command compliance with the Debtor's statutory duties under 11 U.S.C. Section 105.[5]

11. The April 25, 1988, order was

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[5] In McComb v. Jacksonville Paper Co., 336 U.S. 187, 193 (1949), the Court held that the possibility of continued disobedience of statutory obligations, where a proclivity for unlawful conduct in that regard had been shown, "proclaims the necessity of decrees that are not so narrow as to invite easy evasion." Nevertheless, the Supreme Court has at the same time stricken injunctions that compel general compliance with an entire statute. New York, New Have, & Hartford R.R. Co. v. ICC, 200 U.S. 361, 404-5 (1906). When an injunction is too indefinite to be affirmed on appeal in any regard, it is necessarily too indefinite to be a grounds of contempt. See Longshoreman's Asso. v. Marine Trade Asso., 389 U.S. 64, 76 (1967). The Court, for purposes of this contempt proceeding, may not question the validity of the Order of April 25, 1988. Accordingly, the Court does not address whether the provision, requiring cooperation generally, is invalid but only whether it was sufficiently specific as to the conduct involved to give rise to contempt. Whether the provision is valid and enforceable as to other conduct not before the Court is not decided here.

concerned with specific acts of non-cooperation. Although these acts evidenced a general lack of cooperation by the Debtors, the question of furnishing income tax returns and the leases and identities of tenants at 4801 Van Ness Street had not yet surfaced and was not addressed. Although leases of the units at 4111 [sic] Connecticut Avenue were required to be produced, no specific order was entered directing the production of leases of any other property held by the Debtors. Although certain bank records were required to be produced, no mention of tax returns was made.

12. For these reasons, the Court can not conclude that the Order of April 25, 1988, plainly required Mrs. Kearing to produce the income tax returns and the identities and written leases of tenants at 4801 Van Ness Street and their written

leases.

13. Therefore, the Court shall deny the Trustee's motion to hold Mrs. Kearing in contempt for failing to produce income tax returns and the identities and written leases of tenants at 4801 Van Ness Street, N.W. It is regrettable that Mrs. Kearing continues to engage in her self-defeating non-cooperation with the Trustee, thereby unnecessarily increasing the administrative expenses in this case. But that cannot justify holding her in contempt when no order specifically required the production of those returns and tenant information.

CONCLUSION

An appropriate Order shall be entered.

Dated: September 29, 1988.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED JUNE 30, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In re:	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER TO SHOW CAUSE

Upon consideration of the Motion for Issuance of Show Cause Order filed by the Trustee, and this Court's April 25, 1988 order granting the Motion to Compel Cooperation of the Debtors filed by the Trustee, and it appearing to the Court that good cause exists for the issuing of an order to show cause, it is this 27th of June, 1988,

ORDERED that Leon R. and Shirley M. Kearing shall appear in this Court on July 13, 1988 at 2:00 p.m. and show cause why they should not be punished for civil contempt of court because of their misconduct in failing to obey, comply with

and carry out the provisions of the order granting the Motion to Compel Cooperation of the Debtors filed by the Trustee, duly entered herein on April 25, 1988, as set forth in the Memorandum filed in support of the Motion for Issuance of Show Cause Order.

/s/ S. Martin Teel, Jr.
UNITED STATES BANKRUPTCY JUDGE

FILED APRIL 25, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re	)	
	)	
LEON R. AND	)	Case No. 86-00913
SHIRLEY M. KEARING,	)	(Chapter 11)
Debtors	)	

ORDER

This matter having come before the Court on the Motion to Compel Cooperation by Debtors Filed by John W. Guinee, Jr., Trustee herein, and it appearing to the Court that good cause exists for the granting of said Motion, it is, this 23rd day of April, 1988

ORDERED that Leon R. and Shirley M. Kearing make available for inspection the real property owned by said Debtors, including 4801 Van Ness St., N. W., Washington, D. C., by the Trustee and/or an agent to be designated by the Trustee, at 12 noon to 5:00 p.m. Monday through Friday and from 1:00 p.m. to 5:00 p.m. on Sunday,

as reasonably necessary to determine the marketability of the home, at a time to be fixed in writing delivered to Debtors' home by 13 hours in advance or by telephone 3 hours in advance; and it is further

ORDERED that the Debtors cooperate with the Trustee and his agent(s) in an effort to obtain offers to purchase the real property designated above, by maintenance of the premises in clean and orderly condition, so as to make the premises attractive to prospective purchasers, and to otherwise reasonably assist in obtaining high prices for any offers to purchase; and to allow prospective purchasers to examine the premises, upon two and one-half hours advance notice, from a real estate agent, during the hours of 12 noon to 5:00 p.m. Monday through Friday and from 1:00 p.m. to 5:00 p.m. on Sunday; and it is further

ORDERED that the Debtor Shirley M.

Kearing immediately turn over to the Trustee the funds of Debtors at the American Security Bank, N. A. (the Court finding that these funds represent rents received after the Trustee was appointed) and that the Debtor, Shirley Kearing, immediately turn over to the Trustee any and all rents that she may in the future collect from the tenants of Units 201, 502 and 504, 4444 Connecticut Avenue, N. W., Washington, D. C., and that the Debtor, Shirley Kearing, direct said tenants to make all future rent payments directly to the Trustee; and it is further

ORDERED that the Debtor, Shirley Kearing, mail to the Trustee by April 17, 1988 copies of all bank statements, cancelled checks, deposit slips and withdrawal slips for the Debtors' account at American Security Bank, N. A., and it is further

ORDERED that the Debtors cooperate with the Trustee in every other effort which he undertakes in the fulfillment of his statutory duties.

/s/ S. Martin Teel, Jr.
S. MARTIN TEEL, JR.
United States Bankruptcy Judge

FILED FEBRUARY 1, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	
Debtors	)	Case No. 86-00913
	)	(Chapter 11)

ORDER

Upon consideration of the Debtors' "emergency application for a temporary restraining order and motion for a stay of order pending appeal," it is

ORDERED that the application and the motion are both DENIED. See this Court's Order of December 31, 1987 explaining at some length its reasons for denying the Debtors' application for removal of the trustee and for appointment of an examiner. In addition, with respect to the points raised in various numbered paragraphs of the Debtors' application and motion:

Paragraph 4: 11 U.S.C. Section 1104(c) does not require the U.S. Trustee to

consult with all parties in interest when appointing a trustee, and it would be an obvious impossibility for him to do so in cases where there are a large number of creditors. Since debtors cannot receive any distribution unless all creditors either are paid in full or else consent (11 U.S.C. Section 1129(b)(2)(B)), the U.S. Trustee does not ordinarily consult with debtors before appointing a trustee.

Paragraph 5: Section 322(a) does not require a trustee to file an acceptance of appointment. It is this Court's understanding that Mr. Guinee is covered by a blanket bond.

Paragraph 6: The trustee can hardly be expected to complete his investigation of the debtors and file a statement thereon under 11 U.S.C. Section 1106(a) while the Debtors are actively contesting his authority to act as trustee at all.

Paragraph 7: The allegations of paragraph 7 of the Debtors' application and motion tend to show that the trustee has at least started to perform his duties, notwithstanding the Debtors' obstructionism.

Paragraph 8: The trustee is not under any obligation to notify debtors in writing of anything.

Paragraph 9: Whether the Debtors' former attorney should turn over same or all of the papers in his possession to the Debtors' new attorney or to the Trustee is not free from doubt, thus justifying the former attorney in refusing to turn over files to either party, if he so chooses until their respective rights are resolved. The Clerk of this Court makes all public files available to any members of the public, and this Court rejects the Debtors' contrary assertion.

In this Court's view, the Debtors application and motion are legally frivolous and designed solely to harm the Trustee and to cause delay.

Dated: January 29, 1988.

/s/ Geo. Bason, Jr.
George Francis Bason, Jr.
United States Bankruptcy Judge

FILED JANUARY 4, 1988

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

ORDER

Upon consideration of the December 23, 1987 emergency application of Leon R. and Shirley M. Kearing, debtors, by their attorney, Michael R. Huffstetler, for removal of the Chapter 11 trustee, John W. Guinee, Jr., and for appointment of an examiner; and

It appearing that at the hearing held on November 6, 1987 counsel for Chevy Chase Savings Bank, F.S.B. ("Chevy Chase") articulated reasons which in this Court's opinion constituted sufficient "cause" under 11 U.S.C. Section 1104(a)(1) to appoint a trustee, should the Debtors fail to retain qualified counsel within a

reasonable time, in view of the Debtors' obvious lack of competence to represent themselves as debtors in possession pro se, without the assistance of qualified counsel, in this rather complex Chapter 11 bankruptcy case; and

The Court being (both then and now) of the further view that "such appointment [of a trustee] is in the interests of creditors ... and ... the estate" under 11 U.S.C. 1104(a)(2); and

Neither the Debtors nor any other party in interest having filed any opposition to Chevy Chase's motion to appoint a trustee within the twenty-day period specified in this Court's notice dated November 12, 1987; and

It appearing that Mr. Guinee is highly qualified and well experienced as a Chapter 11 trustee, having served as such in this and other courts in a number of difficult

and complex cases; and

It appearing that, so far as the record reveals, Mr. Huffstetler, however competent he may be as an accountant and as an attorney, has had little or no experience in complex Chapter 11 bankruptcy cases as counsel for debtors in possession; and

It further appearing that, contrary to the Debtors' assertion in their pro se "application ... for leave to hire attorney ...," that Mr. Huffstetler is "not a[n] ... insider" and "is ... a disinterested person": (a) Mr. Huffstetler has revealed in his supporting "affirmation" that both he and his law partner Michael F. Solomon are nephews-in-law of Debtor Shirley M. Kearing; (b) accordingly under 11 U.S.C. Section 101(39) they are her "relatives"; (c) therefore they are "insiders" as defined by 11 U.S.C. Section 101(30)(A)(i); (d) thus they are not "disinterested

persons" as defined in 11 U.S.C. Section 101(13)(A), and (e) hence by the express terms of 11 U.S.C. Section 327(a), as incorporated by 11 U.S.C. Section 1107, Mr. Huffstetler is prohibited from serving as counsel for these debtors as debtors in possession; and

It further appearing that none of the "reasons for rescission of court Order to appoint trustee and removal of appointed trustee" set forth on pages 5-7 of the Debtors' December 23, 1987 emergency application is meritorious; and

It further appearing that 11 U.S.C. Section 1104(b) permits appointment of an examiner only "[i]f the court does not order the appointment of a trustee under" Section 1104(a)[sic]; it is

ORDERED that the Debtors' December 23, 1987 emergency application is DENIED.

Dated: December 31, 1987.

/s/ Geo. Bason, Jr.
George Francis Bason, Jr.
United States Bankruptcy Judge

FILED DECEMBER 10, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	
Shirley M. Kearing	)	
Debtors	)	Case No. 86-00913
	)	(Chapter 11)

ORDER

Upon consideration of the oral motion, made at a duly scheduled hearing held on November 6, 1987, by Chevy Chase Bank for appointment of a Chapter 11 Trustee in this case, and after notice and opportunity for hearing, and no opposition or request for hearing having been filed, and good cause having been shown, based on the record of this case, it is

ORDERED that the motion is granted, and the U.S. Trustee is hereby directed to appoint a Chapter 11 trustee in this case.

Dated: December 9, 1987.

/s/ Geo. Bason, Jr.
George Francis Bason, Jr.
United States Bankruptcy Judge

FILED DECEMBER 3, 1987

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

In Re:	)	
Leon R. and	)	Case No. 86-00913
Shirley M. Kearing	)	(Chapter 11)
Debtors	)	
	)	

ORDER AUTHORIZING PAYMENT OF ADMINISTRATIVE EXPENSES; GRANTING APPLICATION FOR LEAVE TO WITHDRAW AS COUNSEL FOR DEBTORS IN POSSESSION; AND PROVIDING FOR OTHER RELIEF

Upcn consideration, at a hearing held herein on November 6, 1987, of the application filed herein on behalf of Debtors in Possession Leon R. Kearing and Shirley M. Kearing for authority to pay specified administrative expenses from Debtors' Estate and the application filed by Alfred Lawrence Toombs, Esq., the attorney of record for such Debtors in Possession, for a supplemental award of compensation and the reimbursement of expenses incurred on behalf of such Debtors

in Possession in this proceeding from April 16, 1987 through August 15, 1987, as to which Notice pursuant to B.R. 2002(b) was given and filed herein on September 17, 1987; and of the application of Alfred Lawrence Toombs, Esq., the attorney of record for such Debtors in Possession, for leave to withdraw his appearance herein, it is this 17th day of November, 1987,

ORDERED, pursuant to 11 U.S.C. §503(b)(1)(A), that Alfred Lawrence Toombs, Esq., the attorney of record for Debtors in Possession is hereby AUTHORIZED to pay, from the funds of Debtors' Estate held by him in escrow, to the following secured creditors the following post-petition costs and expenses of preserving Debtors' real property located at 4801 Van Ness St., NW, Washington, D.C. 20016 with respect to the months of August and September, 1987:

(a). Chevy Chase Savings Bank: Monthly first deed of trust payments of

$2288.18 per month, plus late charges of $69.23 per month, for a total of $4,714.82;

(b). U.S. Mortgage Investment Group, Inc.: Monthly second deed of trust payments of $600.00 per month, plus late charges of $30.00 per month, for a total of $1,260.00;

and it is further

ORDERED, in accordance with 11 U.S.C. §503(b)(2), that the foregoing amounts shall be ALLOWED as administrative expenses of the Debtors' Estate; and it is further

ORDERED, pursuant to District Court Local Rule 201(c), as incorporated by reference in Bankruptcy Court Local Rule 3(a)(2), that the application of Alfred Lawrence Toombs, Esq. for leave to withdraw his appearance herein as attorney for Debtors in Possession is hereby GRANTED; and it is further

ORDERED that Debtors in Possession are hereby urged (as they have stated they intend) to retain new counsel to represent

them as Debtors in Possession in this proceeding, who shall enter an appearance herein on or before December 7, 1987; and it is further

ORDERED, that in the event that Debtors in Possession fail to retain such new counsel on or before December 7, 1987, the Court intends, unless cause to the contrary be timely shown, to appoint a Trustee herein pursuant to 11 U.S.C. §1104(a); and it is further

ORDERED, that the Clerk of this Court shall give all creditors and other parties in interest twenty days' notice, in the form prescribed by B.R. 2002, of the renewal, at the hearing held herein on November 6, 1987, of the motion previously filed herein by Chevy Chase Savings Bank for the appointment of a Trustee pursuant to 11 U.S.C. § 1104(a); and it is further

ORDERED, that Alfred Lawrence Toombs,

Esq. is hereby DIRECTED to continue to retain in an interest bearing account over his signature all funds of Debtors' Estate held by him in escrow as of the date of this Order, pending such further Order of the Court as may be entered upon the retention of new counsel by Debtors in Possession or the appointment of a Trustee pursuant to 11 U.S.C. § 1104(a); and it is further

ORDERED, that Alfred Lawrence Toombs, Esq. is hereby AUTHORIZED AND DIRECTED to surrender to Debtors in Possession or to any new counsel retained by them, against written receipt therefor, all stock certificates or credit cards of Debtors in Possession held in safekeeping by such counsel; and it is further ORDERED, that Alfred Lawrence Toombs, Esq. is hereby RELIEVED of any further responsibility to marshal, collect or safeguard funds or

property of Debtors' Estate, and it is further

ORDERED, that the application of Alfred Lawrence Toombs, Esq. for a supplemental award of compensation and the reimbursement of expenses incurred on behalf of Debtors in Possession in this proceeding from April 16, 1987 through August 15, 1987 is hereby taken under advisement for a period of thirty days, during which Debtors in Possession and such counsel are encouraged to resolve their disputes regarding such application; and it is further

ORDERED, that Alfred Lawrence Toombs, Esq. is hereby GRANTED leave to file a final application for payment, as an administrative expense of Debtors' Estate, of compensation for legal services rendered and reimbursement of expenses incurred on behalf of Debtor in Possession with respect to the period from August 16, 1987 to the

date of the termination of such counsel's involvement in this proceeding pursuant to the terms of this Order, including compensation for legal services to be rendered in connection with the transition to any new counsel retained by Debtors in Possession or to a Trustee appointed by the Court.

Dated: November 19, 1987.

/s/ Geo. Bason, Jr.
George Francis Bason, Jr.
United States Bankruptcy Judge